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No. 96-353

In The
SUPREME COURT OF THE UNITED STATES

October Term 1996

GEORGE GREEN

Petitioner

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD. A Nevada Corporation

Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

PETITIONER'S REPLY MEMORANDUM

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13 pp

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PETITIONER'S REPLY MEMORANDUM

Respondent's Brief in Opposition (hereafter, Respondent's Brief, or RB) contains some 15 references to claimed "embezzlement" by Petitioner George Green, including the statement (RB 3), "The opinion accurately reflects the embezzlement by Petitioner." The Opinion of the Nevada Supreme Court is reprinted at App. 8-12 and contains no reference to embezzlement.

If permitted to be heard, Green would show that he paid over twice their value for the gold coins and used the funds to publish the very material the donor wished to support. The intent of the donor, Overton, at the time he shipped the four packages of coins was thus fully carried out.

ANSWER TO RESPONDENT'S "REASONS FOR DENYING THE WRIT"

The portion of the Respondent's Brief that relates to the issues for which certiorari is sought asserts two arguments and three authorities relied on by the Nevada Supreme Court.

WHETHER OR NOT GREEN OWNED THE COINS, HE WAS ENTITLED TO BE HEARD

Respondent's Brief misstates Green's position and overlooks the failure to the lower court to afford Green due process. The authorities cited in Respondent's Brief do not support the dismissal under the facts of this case.

Green's position is not that a hearing wasn't conducted, but rather that Green wasn't heard.

The District Judge refused to hear Green's explanation when he was called as an adverse witness (12 ROA 1951 ff.) and refused to hear him or any other witness called on his case in chief (App. 15,16).

Thus, the case was decided in an adversarial proceeding without one of the adversaries being heard.[1]

Locken v. Locken 98 Nev 369, 650 P2d 803 (cited RB 5,6) does not say that a

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[1] In fact, neither party to the theory adopted by the trial court was heard below--Green because he was not heard, though he appeared and tried to put on his case, and Overton, because he was never named as a party or claimant to the coins.

constructive trust will be imposed without the trustee/donee being heard. In Locken both the father and the son, the trustor and the trustee, were before the court and were heard. Overton (Trustor, under the theory inserted by the trial court) was not before the Court and Green (Trustee) was not heard. Locken is not support for denying Green his day in court.

Howard v. Dalio 815 P2d 1150, (Mont. 1991) (cited RB 6) is authority for fashioning a constructive trust for a non-party when the non-party is a joint owner, and the joint ownership was represented by another joint owner who was before the court. No joint ownership of the coins is involved in this case. Overton's claim (as asserted by the trial court) is entire. And it is he who was not before the court. None of the issues or defenses vis-a-vis Overton's claimed continued ownership, was ever pleaded or proven and Green was not heard with regard to such issues or defenses or with regard to any other issues or defenses.

In Howard v. Dalio, 815 P2d 1150 (Mont. 1991) (cited RB 6) the constructive trust was pleaded, both parties were heard, and both the person

claiming the constructive trust and the person upon whom it was imposed were before the court and were heard. In Green's case, no one had notice of the basis on which the case was decided (constructive trust). Green had no opportunity to be heard in regard thereto, and Overton was not before the court.

Howard v. Dalio is not authority for the imposition of a constructive trust where no owner claiming the constructive trust was before the court and where the person upon whom the constructive trust was imposed was not heard.

76 Am.Jur.2d Trusts sec. 215 (1992) (cited RB 6), in its concluding statement, says:

> "A court of equity. . .may not grant relief without regard to or examination of the conduct of plaintiff affecting the transaction from which the alleged unjust enrichment arose" (citing McGrath v. Hilding, 41 NY2d 625, 394 NYS2d 603, 363 NE2d 318).

No examination of the "plaintiff" (Overton) with regard to his conduct, nor inquiry into any claimed unjust

enrichment of George Green was conducted[2].

76 Am.Jur.2d Trusts Sec. 215 (RB 6) does not support the proposition that a party claiming gold coins[3] is not indispensable in a case where title to the coins is being determined, nor that such claimant may have a constructive trust imposed in his favor without the other claimant of the coins (Green) being heard.

In fact, the very next section, 76 Am.Jur.2d Trusts, Sec. 216, provides further basis for Green's position:

> "The rule (regarding the imposition of a constructive trust) does not, however, prevent a confidant or fiduciary from making a fair purchase

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[2] No examination of Overton was conducted because the basis for such examination didn't arise until after the trial court invented a new theory of the case, slammed the door of the court in Green's face, and Overton was on his way back to Texas (App. 1-3).

[3] Overton did not ask for the coins until after the lower court had imposed the constructive trust, refused to hear Green's case and (later) directed that Overton designate a recipient to accept the coins.

of the subject matter of the confidence or fiduciary relationship."

George Green was not heard on the question of whether he purchased the coins by fully discharging the purpose for which the coins were supplied. Green was not permitted to show that Overton's repeated requests to use the gold to "get the word out" (App 15-18)[4] were complied with and that he (Green) fully discharged any trust pursuant to which he might have been found to hold the coins.

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[4] The authorization from Overton to Green to use the gold in the way Green used it was repeated orally after Overton sent the gold to Green. Green was not permitted to testify to these statements which would have shown that Overton fully authorized and approved of the use to which his gold had been put.

Additionally, Appellee Phoenix's Exhibit 5, (admitted at 11 ROA 119/21) shows that Green had full authority to "purchase and sell assets . . .and/or precious metals . . .without limit as to amount." If it is contended that Green's disposition of the gold pursuant to the directions of Overton was inappropriate, he is nevertheless entitled to an examination of the question of whether he made a fair purchase that benefitted the donor and/or beneficiary by paying out over twice their value for the coins.

When Overton sent the gold, he sent it to the person who was paying the bills, to be spent on paying the bills. It is his intent at the time the gift was delivered, (and not his position after the purpose for which he supplied the coins was discharged) that determines whether he intended what he did -- send the gold to George Green. The fact that Overton was surprised that the coins existed (App. 18) (because Green sold his own assets on the security of the gold to raise the funds to pay the expenses of "getting the word out") does not show that Green breached any condition pursuant to which the gold was delivered to him. Rather, it shows that Overton knew that the expenses for which he supplied the gold were being met (App. 18). Green never had the opportunity to testify as to these matters or to question Overton about them in connection with any claim Overton might assert with regard to the gold.

No examination of the context of Green's statements was made since he was not heard. No explanation of the statements or the manner in which they fit together appears in the record to be examined, because the trial judge did not permit it.

"DONOR (OVERTON) WAS NOT PREJUDICED"

Whether this is true is immaterial. This Court (and the Ninth Circuit as well) has held that the lack of an indispensable party deprives the court of jurisdiction. Of course, Green's point is that he was prejudiced by having no notice or opportunity to be heard as to any theory of the case fashioned by the trial court when he t erminated the case half way through the proceedings.

Respondent's Brief does not answer the points and cases cited in the Opening Brief, pp. 8-24--due process requires (1) all parties to be before the court who are indispensable to the resolution of the case, and (2) all such parties must be heard.

CONCLUSION

There is plain error in the proceedings below in failing to hear Green's case and failing to require Overton to be before the court on any claim by him to the coins.

These errors are at variance with the holdings of the ninth and other circuits and this Court requiring due process be afforded before the deprivation of

property or a property right.

For these reasons the Writ of Certiorari should be granted.

Respectfully submitted this 15th day of November, 1996.

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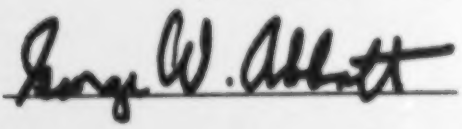
By 

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